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INTEREST OF AMICI CURIAE

Amici Curiae National Trust for Historic Preservation in the United States and the Municipal Art Society of New York file this brief pursuant to Supreme Court Rule 37. Counsel for the parties have consented to the filing of this brief and copies of their letters have been filed with the Clerk of the Court.

The National Trust for Historic Preservation in the United States (the National Trust) is a private nonprofit, charitable, and educational organization chartered by Congress in 1949 to further the historic preservation policy of the United States and to "facilitate public participation" in historic preservation. 16 U.S.C. §§ 461, 468. The National Trust has more than 265,000 individual members and seven regional and field offices nationwide.

Through its Legal Defense Fund, the National Trust advocates to secure judicial, administrative, and legislative decisions that uphold the validity and effectiveness of regulatory protections for historic properties and land-use regulations in general. The National Trust has a particular interest in the protection of transfer of development rights programs, as they are employed by a number of local, regional, and state governments for the protection of historic properties, scenic areas, and farmlands. The National Trust has participated in more than 100 federal and state court cases over the past quarter century, including as amicus curiae in nine regulatory taking cases before this Court.

The Municipal Art Society of New York (the Society) is a 103-year old civic organization that aggressively champions excellence in urban design and planning, and preservation of the best of New York City's past. Its educational and advocacy efforts are dedicated to making New York a more livable city. The Society has been concerned with land-use issues in New

York City for over ninety years and was a proponent of the City's first zoning law, enacted in 1916, and the Planning Commission, created in 1938. For four decades, the Society has been at the forefront of the historic preservation movement in New York City and was a major advocate for the creation of the Landmarks Preservation Law in 1965. As a leading proponent of the efforts to save Grand Central Terminal, the Society has a particular interest in the transfer of development rights in connection with the preservation of historic properties. The Society followed the legal battle from the trial courts to the final decisions in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). The Society often participates in legal cases to advocate thoughtful and careful approaches to the planning and preservation of the urban environment.

The City and County of San Francisco (San Francisco) is a municipal corporation chartered under the laws of the State of California. San Francisco regulates the use of land throughout the City. As part of its land use regulation, San Francisco imposes special conditions and regulations on buildings, structures and other objects to preserve their special architectural, historical or aesthetic value.

San Francisco offers an economic incentive to property owners to encourage preservation of historically or architecturally significant buildings by allowing the owners to transfer their development rights to another lot. San Francisco Planning Code § 128. San Francisco has a vital interest in protecting its transferable development rights program in order to preserve historical or architecturally significant buildings. Such preservation is one of eight priority land use policies adopted by the voters of San Francisco in 1986. *Id.* § 101.1.

STATEMENT OF THE CASE

Amici Curiae adopt Respondent Tahoe Regional Planning Agency's statement of the case.

ARGUMENT

This Court should affirm the decision of the United States Court of Appeals for the Ninth Circuit, which affirmed the decision of the United States District Court for the District of Nevada granting summary judgment to Respondent Tahoe Regional Planning Agency, on the grounds that the regulatory taking claim brought by Petitioner Mrs. Bernadine Suitum was not ripe for judicial review.

Petitioner's claim is not ripe for adjudication because she has failed to apply to the Tahoe Regional Planning Agency (TRPA) to transfer her development rights to another parcel of land. This mechanism for the transfer of development rights (TDR) is an integral part of TRPA's land-use regulatory program and provides Petitioner with constitutionally sufficient use of her property. Application for such a transfer is necessary in order to evaluate the economic impact of the regulation on her property, and is thus a prerequisite to judicial review of her taking claim. Nor has Petitioner shown that an application to transfer her development rights would be futile. In fact, nationwide experience with TDR programs, as documented below, confirms that they are a well-established mechanism for enhancing the value of property subject to regulatory restrictions.

I. PETITIONER'S CLAIM IS NOT RIPE BECAUSE SHE HAS FAILED TO APPLY TO TRPA TO TRANSFER HER DEVELOPMENT RIGHTS, AND THUS THE COURT LACKS AN ADEQUATE BASIS TO EVALUATE THE ECONOMIC IMPACT OF THE LAND-USE RESTRICTIONS ON HER PROPERTY.

This Court has repeatedly found that a regulatory taking claim is not ripe for adjudication unless the property owner has filed "a meaningful application" with the appropriate government regulatory agency, *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 352 n.8 (1986), and the agency "has reached a final decision regarding the application of the regulations to the property at issue." *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985). "A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *MacDonald*, 477 U.S. at 348.

Indeed, this Court has been unwavering in its determination to require an application for regulatory permission, and a decision on that application, before a regulatory taking claim will be considered ripe for judicial review. *Williamson County*, 473 U.S. at 186; *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127 (1985); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 297 (1981); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). Without an application, it is impossible for the reviewing court to determine whether the property owner "'will

be unable to derive economic benefit' from the land." *Williamson County*, 473 U.S. at 191 (footnote omitted).[1]

As this Court explained in *Williamson County*, the economic impact of a regulation, and the extent to which it interferes with distinct investment-backed expectations, "simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Id.* In *Agins*, this Court similarly concluded that the property owners' as-applied taking claim in that case was unripe, because they had not submitted a plan "as the ordinances permit." *Agins*, 447 U.S. at 260.

The current posture of this case presents the same problem. TRPA's regulations clearly set forth a land-use regulatory application procedure for the transfer of development rights, and Petitioner has chosen not to apply for a transfer prior to bringing a regulatory taking claim in court. As explained below, these regulations, once employed, would provide an adequate basis to evaluate the economic impact on Petitioner's property.

TRPA's regulations create a two-part system that sets out the procedures and requirements for property owners undergoing regulatory review for the use of their property. First, TRPA evaluates the environmental capacity of each

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[1] The application requirement will not be satisfied if a landowner who alleges a taking has made no effort or merely a token effort to apply. *See* R. Jeffrey Lyman, *Finality Ripeness in Federal Land Use Cases from* Hamilton Bank *to* Lucas, 9 J. LAND USE & ENVTL. L. 101, 115-18 (1994) (summarizing lower court treatment of this Court's ripeness doctrine).

individual parcel of land to accommodate development, and makes an individualized determination of each parcel's suitability for development.

The second part of TRPA's regulatory program is the TDR provision. TRPA allows—indeed, it facilitates—the transfer of development rights from unbuildable "sending" parcels to other, buildable "receiving" parcels, where those development rights may be employed to increase the size and/or density of development. The TDR program allows the transfer of each type of development right that property owners must possess in order to develop land within TRPA's jurisdiction, including (1) land coverage potential; (2) residential development rights; and (3) residential allocations. TRPA has routinely approved transfers of the three types of development rights since its TDR program was initiated in 1987. Joint Appendix (App.) at 99 (Barnett Affid. ¶ 12).

Each type of development right has a specific transfer mechanism, reflecting its purpose and underlying policies. First, land coverage potential may be transferred from one parcel to another parcel located elsewhere within the same hydrologic area. TRPA Code of Ordinances (TRPA Code), ch. 20. Petitioner's hydrologic area, one of nine within the Lake Tahoe Basin, includes 14,106 acres. App. at 96 (Barnett Affid. ¶ 5). She is thus eligible to transfer her land coverage potential (183 square feet, or the size of a large room addition) to any parcel within this area, for construction of a correspondingly larger project on the receiving parcel. App. at 96 (Barnett Affid. ¶ 6). Petitioner never applied to TRPA to transfer her land coverage potential. Suitum Dep. at 119-20.

Second, residential development rights may be transferred to certain parcels of land within the Lake Tahoe Basin. TRPA

Code, ch. 21. Petitioner possesses one residential development right, which she may apply to transfer to other parcels, subject to county approval and use and density eligibility of the receiving parcel. App. at 97 (Barnett Affid. ¶ 8). Not only are a wide range of parcels eligible to receive such residential development rights, but certain types of development, such as multi-residential projects, can be built only if the developer has acquired residential development rights from other parcels. *Id.* Petitioner never applied to TRPA to transfer her residential development right. Suitum Dep. at 119.

TRPA also grants "multi-residential bonus units" to projects acquiring transferred residential development rights from ecologically sensitive parcels such as Petitioner's. TRPA Code, ch. 35. Because Petitioner's parcel is located in a Stream Environment Zone, three multi-residential bonus units would be available for a project acquiring Petitioner's residential development right through a transfer. App. at 98 (Barnett Affid. ¶ 9).

Third, residential allocations may be transferred from parcels unsuitable for development to any parcel in the Lake Tahoe Basin that can accommodate development, subject to county approval and use and density eligibility of the receiving parcel. TRPA Code, ch. 34. Petitioner obtained a residential allocation in 1989, but she allowed it to lapse. App. at 146 (Scholley Affid. ¶ 8). She remains eligible to receive another residential allocation simply by applying to TRPA. *Id.* The fact that her parcel is environmentally unsuitable for development does not affect her eligibility for a residential allocation. *Id.* Indeed, TRPA has traditionally reserved ten percent of the residential allocations available each year for parcels such as Petitioner's that cannot accommodate development themselves. *Id.* Petitioner has not applied for another residential allocation

since originally being awarded one in 1989, nor did she ever apply to TRPA to transfer the residential allocation she previously possessed. *Id.;* Suitum Dep. at 119.

In ignoring all three of these options for transferring her development rights, Petitioner has likewise ignored this Court's unambiguous constitutional command that owners must ripen their cases before seeking judicial review. The Court must not be put in the position of speculating as to what will happen if and when she applies to transfer her development rights. It is just this sort of guess-work that the ripeness doctrine is designed to preclude. Petitioner should be required to apply for a transfer of her development rights prior to seeking review of her regulatory taking claim.

II. IT WOULD NOT BE FUTILE FOR PETITIONER TO APPLY TO TRANSFER HER DEVELOPMENT RIGHTS, AS SUCH AN APPLICATION WOULD ALLOW HER TO ENJOY A CONSTITUTIONALLY SUFFICIENT USE OF HER PROPERTY.

Petitioner attempts to justify her failure to apply for transfer of her development rights by suggesting that it would be futile to do so. This Court has indicated, however, that "futility" will be found only in extremely limited circumstances. *See MacDonald,* 477 U.S. at 348-49, 352 n.8; *Williamson County,* 473 U.S. at 186; *Agins,* 447 U.S. at 260; *see generally* Lyman, *supra,* at 122-24.

Petitioner's futility argument is based on her denunciation of the entire TDR program as a "contrivance." Petitioner's Brief at 5. This argument completely disregards the many transfers that have occurred since the program was initiated in

1987. App. at 99 (Barnett Affid. ¶ 12). Moreover, it is equally important to recognize that the TDR program administered by TRPA is not, in fact, unique. As discussed in more detail below, TDRs are employed nationwide in land-use regulations to provide additional and valuable uses to regulated property.

A. Nationwide Experience With TDR Programs Demonstrates That TDRs Are Marketable and Provide a Constitutionally Sufficient Use of Property.

TRPA's program for allowing transfers of different types of development rights has many features in common with other TDR programs adopted by state, regional, and local jurisdictions across the country to protect ecologically sensitive lands and historically significant buildings, while enhancing the value of property subject to restrictions.

Relying on the well-established notion of property as a collection of rights, TDR programs recognize the ability to use one's property for development purposes as a right capable of being severed from a particular parcel and thereafter sold for use on another parcel. *See West Montgomery County Citizens Ass'n v. Maryland-National Capital Park & Planning Comm'n,* 309 Md. 183, 522 A.2d 1328, 1330 (1987). The sale of these development rights permits property owners to realize value from rights that are otherwise restricted when it comes to use of the initial owner's property. The TDR process is commenced—and a transfer is possible—only when a property owner files an application. *See Carpenter v. Tahoe Regional Planning Agency,* 804 F. Supp. 1316, 1325 (D. Nev. 1992); *Glisson v. Alachua County,* 558 So. 2d 1030 (Fla. App. 1990).

In order to facilitate markets for development rights, local governments have typically established two administrative mechanisms. *See* Jerold S. Kayden, *Market-Based Regulatory Approaches: A Comparative Discussion of Environmental and Land Use Techniques in the United States,* 19 B.C. ENVTL. AFF. L. REV. 565, 574-77 (1992). A two-party private transaction mechanism permits the owner of a designated sending parcel to sell its transferable development rights directly (or with the assistance of a broker) to the owner of an eligible receiving parcel. A bank-based transaction mechanism enables a governmental agency or nonprofit organization to purchase development rights from the owners of sending parcels and to bank them for later sale to third parties. *See Matlack v. Board of Chosen Freeholders*, 191 N.J. Super. 236, 466 A.2d 83 (1982), *aff'd*, 194 N.J. Super. 359, 476 A.2d 1262 (App. Div. 1984) (upholding county authority to purchase development rights).

It is also common to find a hybrid of these two mechanisms under which a bank exists as a purchaser of last resort, while private transactions normally constitute the development rights market. *See Gardner v. New Jersey Pinelands Comm'n*, 125 N.J. 193, 593 A.2d 251 (1991). The principal market-making issue under any system is ensuring that there is sufficient demand for development rights from the owners of receiving parcels, a bank, or others, to absorb the supply that sending parcel owners may wish to transfer. *See American Savings & Loan Ass'n v. County of Marin*, 653 F.2d 364 (9th Cir. 1981); *Glisson v. Alachua County*, 558 So.2d 1030 (Fla. App. 1990); *Aptos Seascape Corp. v. County of Santa Cruz*, 138 Cal. App. 3d 484, 188 Cal. Rptr. 191 (1982).

Local governments adopt TDR programs after carefully addressing a number of other administrative and policy issues.

See Kayden, *supra.* at p. 10, 574-77. They must define the type of parcel from which development rights will be sent, either categorically (e.g., every farmland parcel of a size exceeding a certain number of acres, or every parcel containing an historic structure, as defined by specific criteria) or geographically (e.g., every parcel within a particular designated district). *See City of Hollywood v. Hollywood, Inc.*, 432 So. 2d 1332 (Fla. App. 1983). Local governments must also identify parcels that may receive development rights, either on a parcel-by-parcel basis or within specifically delineated receiving districts. Local governments have handled these matters in various ways, with some limiting transfers so that they may only take place between contiguous parcels, some delineating areas within which transfers may freely occur, and some allowing transfers anywhere within their jurisdiction between appropriately characterized sending and receiving parcels.

The purposes for which TDRs have been employed are as wide ranging as the purposes of land-use regulation generally. The historic landmark preservation focus of New York City's program is already known to this Court. Farmland preservation motivated Montgomery County, Maryland. The Pinelands Commission in New Jersey and Suffolk County on New York's Long Island each adopted TDR programs to protect open space and wetlands.

It may prove instructive to this Court's consideration of this case, and the role of TRPA's TDR program, to have a brief synopsis of three well-known, and distinct, TDR programs. The most prominent TDR program (not least because of this Court's opinion in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978)) exists in New York City, where it is designed to enhance protection of designated historic landmarks. The program operates under the City's zoning

ordinance, which generally allows transfers from parcels containing designated historic landmarks to "adjacent" parcels, including parcels that are contiguous, across the street, or, where there is a common chain of title, connected through intervening streets. N.Y. City Zoning Resolution § 74-79.

The amount allowed to be transferred under this provision is the difference between the maximum allowable floor area for the sending parcel under existing zoning, and the built floor area of the existing zoning lot, including the landmarked structure. The amount allowed to be utilized on the receiving parcel is not capped within the central business districts—where Grand Central Terminal and numerous other landmarks are located—but is limited elsewhere to an increase of no more than twenty percent above the otherwise maximum allowable floor area of the proposed new development. The City Planning Commission also reviews each proposed transfer to ensure that the landmark on the sending parcel will be preserved after the transfer and that there will be no land-use planning problems created on or near the receiving parcel as a result of the transfer. In addition, a number of other TDR provisions also apply to New York City's historic landmarks. *See* Brief of Amicus Curiae City of New York.

In San Francisco, TDRs have been successfully used in the city's downtown area to increase the allowable density of development beyond that otherwise permitted by San Francisco's planning law. TDRs may be transferred from a lot containing a building which San Francisco has designated significant or a landmark (a Transfer Lot). San Francisco Planning Code § 128(a). Similar to New York City's TDR program, the amount of TDRs available for transfer consists of the difference between the allowable gross floor area of the existing structures on the Transfer Lot. *Id.* § 128(b).

San Francisco's TDRs may be transferred to another lot located in the downtown zoning district, *id.* § 128(c), either as a group to a single transferee or in separate increments to multiple transferees. *Id.* § 128(g). TDRs may be transferred directly to the owner of the lot to be developed. *Id.* Once the owner has purchased TDRs, the gross floor area of the structure to be constructed on that lot increases by the amount of TDRs transferred. *Id.* § 128(a).

Another well-known TDR program that has a successful track record of transfers exists in New Jersey's Pine Barrens. Covering the entire million-acre area under the jurisdiction of the Pinelands Commission, this TDR program is designed to protect forested and agricultural areas while concentrating growth in areas served by adequate infrastructure and otherwise capable of handling new development. The Pinelands Comprehensive Management Plan establishes land-use districts across the entire jurisdiction, including agricultural production areas, forest areas, preservation areas, rural development areas, regional growth areas, and villages and towns, among others. N.J. Stat. Ann. §§ 13:18A-1 to -29. Within certain areas, including villages, towns and growth areas, almost all types of development are allowed, while preservation and agricultural areas are more restricted. The TDR program allocates development rights within these restricted areas, with each development right allowing construction of up to four new houses in regional growth areas. There is also a bank which administers the program by keeping records, issuing the relevant documentation, tracking actual transfers, providing useful information to prospective purchasers or sellers of development rights, and periodically purchasing such rights itself. *See Gardner v. New Jersey Pinelands Comm'n*, 125 N.J. 193, 593 A.2d 251 (1991).

The New York City and San Francisco TDR programs for historic preservation and the New Jersey Pinelands TDR program for protection of environmentally sensitive land are three of many TDR programs employed successfully across the country in land-use regulatory programs. The following table describes the location, purpose, and levels of activity of a cross-section of TDR programs employed over the past twenty years throughout the United States.

Table 1: Nationwide Examples of Operating Transfer of Development Rights Programs

Location	Purpose	Transfer Activity/ Comments	Source
Belmont, California	Reduce or eliminate development on steep slopes	Six transfers as of 1993	note 1
Burbank, California	Promote appropriate concentration while maintaining overall development capacity within limits of transportation and public service systems	Two transfers involving over 400,000 square feet	note 2

Cupertino, California	Create flexible density limitations to assist operation of Traffic Intensity Performance Standard regulation	Between 30 and 40 transfers; very few development rights are left to be transferred	note 3
Los Angeles, California	Preserve historic structures, promote housing, improve transportation, and protect open space	Three projects approved involving one million square feet of office, hotel, and retail floor area; developers pay $35 per square foot of floor area transferred	note 4
Monterey Co., California	Protect view corridors and Big Sur	Transfers involve about 20 acres	note 5
Morgan Hill, California	Preserve hillside land	67 transfer credits have been purchased, involving 108.5 acres of hillside land; transfer credits sell for about $75,000 each	note 6
Oxnard, California	Control beachfront development	Transfers occurred between 1984 and 1988	note 7

Pacifica, California	Site-specific	One transfer involving 20 acres	note 8
Pismo Beach, California	Preserve open space	Preserve public access to beach	note 9
Placer Co., California	Preserve open space	Provides economic value to property owners affected by a 300-foot setback requirement	note 10
Roseville, California	Limit density of development	Transfer rights between parcels owned by developer wanting to build a subdivision	note 11
San Diego, California	Preserve historic structures	At least two transfers involving 5 to 10 residential units	note 12
San Francisco, California	Preserve historic structures	Ten transfers; successful because TDR is central mechanism for exceeding San Francisco's downtown density limit	note 13
San Luis Obispo Co., California	Reduce development along highly erodible coastal areas and to protect critical habitats	About 200 transfers	note 14

San Mateo Co., California	Preserve farmland and agricultural activity	Two bonus density credits have been transferred	note 15
Santa Monica Mountains California	Reduce potential landslide and fire hazards, minimize impacts on public service systems and avoid environmental degradation	Over 500 transfers; prices vary according to demand; in the early 1980's, a TDC was priced at $43,000, and a low of $15,000 per TDC was reached in the mid-80's	note 16
Irvine, California	Encourage residential development	One transfer involving 400 unit residential complex; ordinance designed with a specific project in mind	note 17
Pasadena, California	Preserve historic properties	Three transfers; other methods can also be used to increase density	note 18
Boulder, Colorado	Preserve farmland	Received 1996 award under state "Smartgrowth" program	note 19
Douglas Co., Colorado	Preserve open space	Received 1996 award under state "Smartgrowth" program	note 20

Washington, D.C.	Protect historic buildings	Transfers protect old downtown, permit increased height for new development	note 21
Collier Co., Florida	Preserve environmentally sensitive land	325 acres preserved	note 22
Maitland, Florida	Preserve open space	One transfer involving 3.5 acres at $35,000 value	note 23
Palm Beach Co., Florida	Preserve environmentally sensitive land	One major transfer since 1992, valued at $1.2 million; other credits would allow 6,400 additional homes.	note 24
Calvert Co., Maryland	Preserve farmland	Used to counteract urban sprawl	note 25
Charles Co., Maryland	Preserve farmland	Used by six developers; approved in 1992.	note 26
Montgomery County, Maryland	Preserve farmland	Development rights for about 40% of the county's 91,000 rural acres have been sold; the 1981 plan gives 1 TDR for every 5 rural acres; permits an extra unit beyond base zoning	note 27

Queen Anne's County, Maryland	Preserve farmland	In active use	note 28
St. Mary's County, Maryland	Preserve farmland	Approved in 1990	note 29
Burlington Co., New Jersey	Preserve farmland	Pilot program passed by legislature	note 30
Pinelands, New Jersey	Preserve environmentally sensitive land	Transfers involving 12,318 acres	note 31
New Jersey	Preserve open space	Municipal Land Use Act permits offsite clustering of noncontiguous parcels in common ownership/control	note 32
New York City	Preserve historic landmarks	About a dozen transfers	note 33
Suffolk Co. (Pine Barrens), New York	Preserve environmentally sensitive land	Transfers involving 8.5 acres, with 158 credits issued to 121 parcels	note 34
Westchester Co., New York	Preserve 127-year old church	Transfer involving 100,000 square feet, at a value of $3.7 million; developer bought air rights from Grace Episcopal Church	note 35

Lancaster Co., Pennsylvania	Preserve farmland	Four TDRs transferred, each costing $5,500; developer expects to buy as many as 50 TDRs to complete project	note 36
Pittsburgh Pennsylvania	Protect historic buildings and arts facilities	Development rights purchased and transferred from two theaters	note 37
Austin, Texas	Riverfront preservation	Used in revitalization of Austin's Colorado River promenade	note 38
Blacksburg, Virginia	Preserve open space, farmland, and forest	Adopted in 1996 to protect Tom's Creek Basin	note 39
Pierce Co., Washington	Preserve farmland	Covers 1,800 acres of farmland	note 40
Seattle, Washington	Preserve historic theaters	At least three transfers for Hyatt Regency project involving 130,012 square feet; developer paid $1.47 million to be used for city's affordable housing fund	note 41

Portland, Oregon	Preserve & maintain single-room occupancy housing	Adopted in 1988 as part of Central City Plan	note 42

Footnotes to Table:

1. RICK PRUETZ, PUTTING TRANSFER OF DEVELOPMENT RIGHTS TO WORK IN CALIFORNIA 59-60 (Solano Press 1993).
2. *Id.* at 77-78.
3. *Id.* at 75-77.
4. *Id.* at 67-69.
5. *Id.* at 46-47.
6. *Id.* at 58-59.
7. *Id.* at 47-49.
8. *Id.* at 49-50.
9. *Id.* at 50-51.
10. *Sacramento Bee*, Oct. 10, 1996, at N1.
11. *Id.*, April 21, 1996, at N3.
12. PRUETZ, *supra* n.1, at 71-72.
13. *Id.* at 66-67.
14. *Id.* at 56-57.
15. *Id.* at 73-74.
16. *Id.* at 53-55.
17. *Id.* at 79-80.
18. *Id.* at 69-71.
19. *The Denver Post*, July 28, 1996, at D4.
20. *Id.*
21. *Washington Post*, Aug. 3, 1996, at C1.
22. PRUETZ, *supra* n.1.
23. *Orlando Business Journal*, Oct. 4, 1996, at 32.
24. *Palm Beach Post*, Aug. 28, 1996, at 4B.
25. *Washington Post*, March 25, 1995, at E1.
26. *Warfields Business Record*, Sept. 16, 1996, at 1.
27. *Washington Post*, Nov. 16, 1996, at E1; *Warfields Business Record*, Sept. 16, 1996, at 1.
28. *The Capital*, Sept. 18, 1996, at A10.
29. *Warfields Business Record*, Sept. 16, 1996, at 1.

30. *New York Times*, Feb. 18, 1996, sec. 9, at 11; AMANDA GOTTSEGEN, PLANNING FOR TRANSFER OF DEVELOPMENT RIGHTS: A HANDBOOK FOR NEW JERSEY MUNICIPALITIES 159 (Burlington Co. Freeholders 1992)
31. *New York Times*, Feb. 18, 1996, sec. 9, at 11.
32. *Id.; New Jersey Lawyer*, July 29, 1996.
33. RICHARD RODDEWIG & CHERYL INGHRAM, TRANSFERABLE DEVELOPMENT RIGHTS PROGRAMS 8 (American Planning Ass'n 1987).
34. *Newsday*, March 27, 1996, at A28; *Id.*, April 20, 1996, at A19.
35. *New York Times*, July 8, 1990, sec. 10, at 15.
36. *Intelligencer Journal*, Oct. 31, 1995, at B1.
37. TERRY J. LASSAR, CARROTS AND STICKS: NEW ZONING DOWNTOWN 185 (Urban Land Inst. 1989).
38. *Asbury Park Press*, July 21, 1996, at C3.
39. *Roanoke Times & World News*, Nov. 14, 1996, at NRV12.
40. *News Tribune*, Nov. 7, 1996, at B3.
41. *Seattle Times*, Jan. 5, 1993, at B1; *Id.*, Oct. 1, 1996, at B2; LASSAR, *supra* n.37, at 186-87.
42. *Id.* at 185-86.

In short, TDR programs are widely established nationwide, and have proven effective in managing development in sensitive areas.

B. This Court Has Expressly Accepted the Role of TDR Programs in Determining Whether Private Property Retains a Constitutionally Sufficient Use.

Perhaps in recognition of the fact that TRPA's TDR program would provide a means through which she could realize economic value for her property, Petitioner resorts to the extreme—and constitutionally unsustainable—position that "use" (by which she appears to mean residential development geographically located only on her parcel) and "value" (by which she appears to mean, *inter alia*, what she might receive from the sale of her TDRs) are somehow distinct. Petitioner's

Brief at 12-15, 30-34. This Court's landmark *Penn Central* case unequivocally contradicts Petitioner's assertions, making clear that the ability to transfer development rights constitutes a "use" of property within the meaning of this Court's precedents, a use that Petitioner has chosen to disdain. In *Penn Central,* this Court expressly concluded that:

> Appellants . . . exaggerate the effect of the [New York City landmarks] law on their ability to make use of the air rights above the Terminal . . . . [T]o the extent appellants have been denied the right to build above the Terminal, it is not literally accurate to say that they have been denied *all* **use** of even those pre-existing air rights. Their ability to use these rights has not been abrogated; they are made transferable to at least eight parcels in the vicinity of the Terminal, one or two of which have been found suitable for the construction of new office buildings.

Penn Central Transportation Co. v. New York City, 438 U.S. at 136-37 (footnote omitted; emphasis in original and added).

In addition, the Court stated that the ability to transfer such rights must be taken into account in order to determine whether a taking has occurred at all:

> Although appellants and others have argued that New York City's transferable development-rights program is far from ideal, the New York courts here supportably found that, at least in the case of the Terminal, the rights afforded are valuable. While these rights may well not have constituted "just compensation" if a "taking" had occurred, the rights nevertheless undoubtedly mitigate whatever financial

> burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation.

Id. at 137 (footnote omitted). It is axiomatic that the Court in *Penn Central* would not have specifically relied on New York City's TDR provision, and the economic value that such transfers would bring to the property owner, if the availability of development rights transfers was meaningless to a determination of whether a regulatory action effected a taking.

This Court's opinion in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992), is similarly supportive. There, the trial court found that the actions of the state's regulatory agency had rendered the owner's property valueless, i.e., worth zero dollars, and this Court expressly decided the case "under the same factual assumption[]." *Id.* at 1020 n.9. There is no such factual finding in this case.

The *Lucas* opinion used a variety of formulations to describe the circumstances under which a categorical "total taking" might occur, triggering the obligation to compensate, absent a nuisance or property law-based exception. *Id.* at 1029-30. This Court variously described the categorical taking standard as a denial of "all economically beneficial or productive use" of land, *id.* at 1015; all "economically viable" use, *id.* at 1016; "all economically feasible use," *id.* at 1016 n.7, and "all economically valuable use," *id.* at 1028. Yet the Court repeatedly emphasized the word "economic," and explicitly recognized when framing its analysis: "For what is the land but the profits thereof?" *Id.* at 1017 (quoting 1 E.COKE, INSTITUTES ch. 1, § 1 (1st Am. ed. 1812)). If the state of South Carolina had offered a TDR option that provided Lucas with some economic

use of his property, then he would not have been able to prove a categorical total taking.

Petitioner's argument—that the Constitution demands that her development rights be exercised in a geographically specific fashion on her parcel of land—yields the bizarre result that, even if the transfer of her development rights would yield hundreds of thousands of dollars, an amount potentially worth more than the parcel itself, TRPA's action would still effect a taking. In fact, the evidence in the record suggests that her development rights—and her restricted parcel itself—may have substantial value.

For example, in addition to any residual value of Petitioner's parcel, which could be realized through sale to adjacent owners for purposes of open space, view protection, or privacy, each of her development rights appears to have value in the marketplace for TDRs in the Lake Tahoe Basin. Those rights are valued at between $10,000 and $51,500, including approximately $30,000 for the residential allocation right. *See generally* App. at 130-32 (Johnson Affid.). These numbers are, of course, not precise, which only serves to emphasize that Petitioner's case is not ripe, but they confirm that there is substantial value to be realized from her property. Furthermore, the record shows that the State of Nevada recently offered to purchase Petitioner's parcel for $35,000 under a program (which continues to have available funds) to buy ecologically sensitive lands. *See* App. at 141 (Johnson Suppl. Affid. ¶ 12).

III. EVEN IF IT WERE RIPE, PETITIONER'S TAKING CLAIM WOULD FAIL UNDER THIS COURT'S PRECEDENTS BECAUSE SHE HAS FAILED TO SATISFY THE CONSTITUTIONALLY REQUIRED STANDARDS.

Petitioner cannot succeed on the merits of her regulatory takings claim even if it is deemed to be ripe. Absent a *Lucas*-type "total taking," a physical occupation, or a finding that a regulatory action does not substantially advance legitimate state interests, this Court's inquiry to determine whether a regulation has effected a taking consists of three factors: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action. *Penn Central*, 438 U.S. at 124; *see* Jerold S. Kayden, *Hunting for Quarks: Constitutional Takings, Property Rights, and Government Regulation*, 50 WASH. U. J. URB. & CONTEMP. L. 125, 133-35 (1996). The inquiry focuses on whether the property owner can earn a "reasonable return" on its use of "the parcel as a whole." *Penn Central*, 438 U.S. at 129-31.

The record below fails to establish that TRPA's restrictions violate the *Lucas* categorical total taking test, the *Penn Central* three-factor inquiry, or that there is a physical occupation or failure to substantially advance legitimate state interests.

CONCLUSION

Amici Curiae National Trust for Historic Preservation, the Municipal Art Society, and the City and County of San Francisco respectfully request that this Court affirm the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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